APPEAL NO. 92095
APRIL 27, 1992

On February 10, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that the respondent, claimant herein, "popped" his back while pulling on a wrench on January 22, 1991, but concluded that the incident did not result in a compensable injury and that he failed to give timely notice to his employer of his injury of January 22, 1991. However, the hearing officer found that claimant injured his back on (date of injury), when he slipped and fell off of his employer's truck, and concluded that the (date of injury), incident resulted in a compensable injury and that claimant gave timely notice of that injury to his employer. The hearing officer decided that claimant is entitled to receive medical benefits and is also entitled to receive temporary income benefits (TIBS) for disability resulting from the (date of injury), back injury if, when, and as they accrue pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Carrier, employer's workers' compensation insurance carrier, contests Findings of Fact Nos. 6, 7, and 8, and Conclusions of Law Nos. 5 and 6, all of which concern the injury of (date of injury). Carrier also contends that it cannot institute weekly income benefits because there is insufficient evidence to determine claimant's average weekly wage (AWW). Claimant has not filed a request for review of the findings and conclusions that are adverse to him, nor has he filed a response to carrier's request for review of the findings and conclusions in his favor.

DECISION

Finding that there is sufficient evidence to support the contested findings of fact, conclusions of law, and decision, and that the contested findings, conclusions, and decision are not so against the great weight and preponderance of the evidence as to be manifestly unjust, we affirm the hearing officer's decision.

The parties agreed at the hearing that the issues to be resolved by the hearing officer were: (1) Whether claimant injured his back on January 22, 1991, while in the course and scope of his employment with his employer; (2) Whether claimant aggravated his injury of January 22, 1991, on (date of injury), while in the course and scope of his employment for the employer; (3) Whether claimant gave the employer notice of his injury of January 22, 1991, within 30 days of that injury; and, (4) Whether claimant gave the employer notice of his injury of (date of injury), within 30 days of that injury.

In ruling on a question of the factual sufficiency of the evidence, we consider and weigh all the evidence in the case and should set aside the hearing officer's decision if we conclude that the decision is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951);

Texas Workers' Compensation Commission Appeal No. 92019, decided March 9, 1992.

Claimant, a 28-year-old male, started working for the employer installing sprinkler systems on December 12, 1990. He testified that on January 22, 1991, while installing a sprinkler system with the help of his supervisor, Mr. K, he "popped" his back and immediately reported the accident to his supervisor. His supervisor denied the report of injury and said there was no indication on January 22, 1991, that claimant hurt his back. There was no evidence that claimant missed any work as a result of that accident or that he sought medical attention for his back until after (date of injury), the date of the second work incident involving his back.

On (date of injury), a Friday, claimant testified that about 4:30 p.m. he slipped on some oil that was on his employer's truck and fell off the bumper of the truck injuring his back. He said his supervisor was present when this happened and asked him if he was okay, to which claimant replied, "no." His supervisor denied any knowledge or report of that incident, and said that he was with claimant that day and saw no indication that claimant hurt his back. Claimant said he spent most of the weekend in bed recuperating and that when he was unable to get out of bed on the morning of February 18, 1991, a Monday, he asked his wife to call work and "make up a story" as to why he wasn't going to work so he wouldn't be fired. He said he told his wife to lie. He said his wife told him she had called his employer and told them he was hurt, but that she said nothing about being hurt over the weekend. Claimant further testified that he called his employer on Tuesday, February 19th and was told by Mr. H, the president of the company, that he would need a doctor's release before going back to work. He said he lied to Mr. H and told him he had already seen a doctor and had a doctor's release. He said he lied to Mr. H because he didn't have the money to see a doctor. He also said he could not get to work on Tuesday because the roads were blocked due to flooding. On Wednesday, February 20th, claimant said he went to work and told Mr. H that he got hurt over the weekend when he was wrestling with a friend. Claimant testified that what he told Mr. H about being hurt over the weekend was a lie and that he told the lie because he had been fired from a previous job when he sustained a back sprain on the job. He said his previous injury did not result in a workers' compensation case. According to claimant, Mr. H took him into a room away from others that were present at the time and told him he needed a doctor's release to return to work. Claimant said he told Mr. H he did not have a doctor's release and could not afford a doctor and that he needed his paycheck in order to see a doctor. Claimant said he tried to tell Mr. H that he was hurt on the job on (date of injury), but that Mr. H got angry at him for lying. He said he then told Mr. H he was injured when he slipped off the bumper of the truck. Claimant said Mr. H didn't want to hear about the incident and told claimant his insurance rates would go up if he had another claim. Claimant stated that Mr. H's wife, Mrs. H, who is an officer of the company, gave him his paycheck. He added that his last day working for his employer was the day of the second work incident, (date of injury), and that he hasn't been able to get a job since working for the employer because everybody in (county) knows he has an injury and won't hire him because of his injury. When asked why he told his doctor he was hurt on January 29, 1991, claimant answered that he told the doctor the

"approximate" date he was injured. When asked why he waited 30 or 31 days from the date of the first work incident on January 22, 1991, to see a doctor, claimant answered that it didn't hurt as bad until he fell off the truck and was unable to get out of bed the following morning.

Claimant's wife, Mrs. V, testified that although she could not recall the date of the occurrence, she remembered that one day claimant came home from work and said he had been hurt working on some pipes. She said she didn't think he was hurt except for a pulled muscle. She also recalled a second incident on a Friday when claimant pulled his car into their driveway after work, but did not immediately get out of the car. She said she went outside to check on him and found him sitting in the car crying. She said he told her he got hurt at work when he slipped off the bumper of the truck. She testified that she had to help claimant out of the car and into their bed. Mrs. V further stated that she could tell that claimant was in pain; that the weekend of February 16th and 17th claimant stayed in bed; and that she had to take care of him by bringing him his meals in bed, bathing him in bed, and helping him to the bathroom. Mrs. V further testified that on Monday, February 18th, claimant told her to call his work and lie about why he wasn't going to work, but that she told claimant she doesn't lie. She said she called claimant's employer that morning and told Mrs. H that claimant was hurt and said that the telephone then either "went dead," or that Mrs. H hung up on her.

Mr. H testified for carrier. He stated that claimant never reported an injury of January 22, 1991, to him, and that he first heard of the (date of injury), injury at the benefit review conference which was held on January 6, 1992. He said claimant's wife called work on Monday, February 18th and told Mrs. H that claimant hurt his back. He said he told Mrs. H to call back and tell claimant he needed a doctor's release before coming back to work. He further stated that claimant came to work on Tuesday, February 19th and told him and Mrs. H that he had been drinking and roughhousing over the weekend and that one or two men had slammed him down on the ground on his hip. He said claimant appeared to be in pain at the time claimant reported this incident to them. Mr. H said that when he told claimant he would need a doctor's release, claimant told him he didn't have one, that he didn't have money to see a doctor, that he had lied, and that claimant then indicated he wanted workers' compensation to cover his injury. Mr. H denied that claimant mentioned an injury from slipping off the truck on (date of injury), or an injury of January 22nd. He also said he never told claimant anything about insurance rates going up, and that the last thing he told claimant was to get a doctor's release. He said claimant never called work or came back to work after February 19, 1991.

Mrs. H also testified for carrier. She said that no report of injury for January 22 or (date of injury), was made to her, and that she had no knowledge of injuries on those dates. She also said that when claimant picked up his check after work on Friday, (date of injury), he did not mention an injury to her and she didn't notice any indication of a back injury. Mrs. H also testified that claimant's wife called her the morning of February 18th and told her claimant had been hurt over the weekend and was going to see a doctor. She said she

called claimant's wife back and told her claimant would need a doctor's release when he came back to work. She said she did not hang up on claimant's wife and that the telephone did not disconnect during these conversations. She said she made a notation of the telephone calls on the time sheets on the day of the calls. Such a notation appears on claimant's time sheet for the week ending February 23, 1991, which was introduced into evidence by carrier. On Tuesday, February 19th, she said claimant was "walking stiff" when he came to work and that she heard claimant say he had been hurt in a fight over the weekend when he was thrown to the ground. She also said that the first she knew of claimant's work-related claim was on June 7, 1991, when she received a letter from claimant's attorney.

In addition to testifying that he worked with claimant on January 22, 1991, and (date of injury); that claimant did not appear to be injured on either of those days; and that claimant did not report an injury to him on either of those days; claimant's supervisor testified that he didn't recall claimant slipping off the bumper of the truck and falling on (date of injury), and that claimant told him on February 19th that he had hurt his back in a fight over the weekend. He also said that claimant could not have done the work they were doing on (date of injury), if claimant had a back injury on that day. He said claimant did not work for the employer after (date of injury).

In a July 1, 1991, report of an examination performed on February 22, 1991, which was introduced into evidence by claimant, Dr. M, stated that claimant told him he had injured his back on January 29, 1991, while pulling on a wrench and that he felt pain immediately. Dr. M diagnosed "Lumbar sprain/strain injury with possible lumbar discopathy accompanied by radiating pain in the right hip and buttocks." A statement for services rendered by Dr. M indicated claimant received treatments (muscle stimulation, lumbar traction, hydrocollator) on 15 occasions from February 22 through April 29, 1991. A September 10, 1991, CAT scan of claimant's lumbar spine revealed a mild bulge at the L4-L5, and mild degenerative changes in the facets joints at L5-S1.

The findings of fact and conclusions of law contested by carrier are:

## FINDINGS OF FACT

6.Claimant injured his back when he slipped and fell off the employer's truck while loading equipment on (date of injury).

7Claimant's (date of injury), back injury resulted in disability that lasted for at least three days.

8Claimant reported the(date of injury), injury to the employer as a work-related injury.

## CONCLUSIONS OF LAW

5.Claimant received a back injury that arose out of and in the course and scope of his employment on (date of injury).

6.Claimant gave timely notice to the employer of the work-related (date of injury), injury as required by Article 8308-5.01.

Under the 1989 Act, a "compensable injury" is defined as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). An "injury" is defined as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." Article 8308-1.03(27). It has been held that strains, sprains, wrenches and twists due to unexpected, undesigned or fortuitous events are compensable even where there is no overexertion and the employee is predisposed to such a lesion. *See* Hanover Insurance Company v. Johnson, 397 S.W.2d 904, 905 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.). It has also been held that an injury that aggravates a pre-existing condition is compensable provided an accident arising out of employment contributed to the incapacity. Texas Employers Indemnity Company v. Etie, 754 S.W.2d 806, 807 (Tex. App.-Houston [1st Dist.] 1988, no writ). Notice of the injury must be given to the employer not later than the 30th day after the date on which the injury occurs. Article 8308-5.01(a). Notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Article 8308-5.01(c).

In this case the evidence is conflicting on the issues of whether claimant sustained a compensable injury on (date of injury), and whether he gave his employer timely notice of that injury. The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). When presented with conflicting testimony, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. R.J. McGalliard v. Kulmon, 722 S.W.2d 694, 697 (Tex. 1987). The hearing officer is not bound to accept the testimony of the claimant at face value. Garza, *supra*. However, the claimant's testimony, if believed, can support a finding of injury in the course and scope of employment in a case such as this. *See*, Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). Additionally, the hearing officer, as the trier of fact, may reach his or her conclusions by blending all evidence before him or her and is not required to credit all testimony of any witness. Texas Employers' Insurance Association v. Stephenson, 496 S.W.2d 184, 188 (Tex. Civ. App.-Amarillo 1973, no writ). Some discrepancy between a claimant's previous testimony and that given at trial does not preclude the trier of fact from giving credence to the evidence offered by the claimant. Stephenson, *supra*.

It is our opinion in the instant case that the testimony of claimant and his wife together

with Dr. M's diagnosis of a lumbar sprain/strain supply evidence from which the hearing officer could reasonably conclude that claimant sustained a compensable injury to his back on (date of injury). To be sure, there is also evidence from which the hearing officer could have inferred to the contrary. However, it has been held that a reviewing court is not authorized to set aside a verdict because the trier of fact may have drawn inferences and conclusions different from those the court deems most reasonable, even though the record contains evidence of, or gives equal support to, inconsistent inferences. Garza, *supra*. We hold that Finding of Fact No. 6 and Conclusion of Law No. 5 are supported by evidence or probative value and are not so against the great weight and preponderance of the evidence as to be manifestly unjust.

In regard to the question of timely notice of the (date of injury) injury, claimant swore that he told his supervisor on (date of injury), that he was injured on that day, and swore that he told the president of the company of that injury on February 20, 1991. The supervisor and the president of the company denied receiving such notice of injury. The hearing officer heard their controverted testimony and resolved the matter in favor of claimant's testimony as he was entitled to do under the authorities previously cited herein. *See also* Associated Employers Insurance v. Burris, 321 S.W.2d 112, 117 (Tex. Civ. App.-Amarillo 1959, writ ref'd n.r.e.). We hold that Finding of Fact No. 8 and Conclusion of Law No. 6 are supported by probative evidence and are not so against the great weight and preponderance of the evidence as to be manifestly unjust.

We also find that Finding of Fact No. 7 (back injury resulted in disability that lasted for at least three days) is supported by some evidence of probative value, that being claimant's testimony, and that such finding is not so against the great weight and preponderance of the evidence as to be manifestly unjust. We note that, except as otherwise provided by the 1989 Act, income benefits are to be paid without order from the Commission on a weekly basis as and when they accrue, and that weekly income benefits may not be paid under the 1989 Act for an injury that does not result in disability for a period of at least one week. Articles 8308-4.21(b) and 8308-4.22(a). We also note that an employee who has disability and who has not attained maximum medical improvement is entitled to TIBS. Article 8308-4.23(a). However, TIBS accrue beginning on the eighth day of disability. Article 8308-4.23(a). The hearing officer decided that claimant is entitled to TIBS for disability resulting from the (date of injury), injury if, when, and as accrued, and ordered carrier to pay weekly income benefits to which claimant may be entitled consistent with her decision and the 1989 Act. In sum, although the hearing officer found that claimant had disability for at least three days, pursuant to Articles 8308-4.22(a) and 8308-4.23(a), claimant's TIBS would not begin to accrue until the eighth day of disability, and pursuant to Article 8308-4.21(b), the income benefits are to be paid without order from the Commission on a weekly basis as and when they accrue. Whether or not claimant would be entitled to weekly income benefits would not preclude recovery of medical benefits for his compensable injury. Article 8308-4.22(a).

Finally, carrier asserts that the Texas Employment Commission (TEC) has advised

its attorney that TEC will not provide to it wage reports for claimant for the 12 months prior to the date of injury, and therefore, the evidence is insufficient to determine claimant's AWW under Article 8308-4.23(d). We first note that AWW is to be computed under the provisions of Article 8308-4.10. Rule 128.2(a) provides a presumption that the employer's last payment to the employee for personal services based on a full week's work accurately reflects the employee's wage until the employer files the required wage statement, or the correct wage is determined by other evidence, if the employer does not file the wage statement. Article 8308-4.23(d) pertains to the rate at which TIBS are to be paid to employees who earn less than $8.50 per hour, as did claimant. In determining the amount of tibs to be paid an employee who earns less than $8.50 per hour, Article 8308-4.23(d) takes into account the employee's actual earnings for the previous year. A rebuttal presumption of actual earnings for the previous year is established through wage reports to be provided by the TEC under Article 8308-4.23(e). We refer carrier to the Senior Ombudsman for the Texas Workers' Compensation Commission for assistance in immediately securing the necessary wage reports from TEC. We also refer carrier to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2 which sets forth the method for calculation of tibs payable for employees who earn less than $8.50 per hour. Rule 129.2(c) provides that in order to obtain wage information from the TEC pursuant to Article 8308-4.23(d), the insurance carrier may request, and the employee shall sign, a waiver provided by the carrier for the carrier to obtain evidence of actual earnings for the prior year.

The hearing officer's decision is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge